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Bruce Kraker

Proc. I

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-186855

DATE: January 3, 1977

MATTER OF: Sanders Associates, Inc.

DIGEST:

RFP for ADPE for lease with purchase option contains specifications requiring interchangeability of equipment beyond that approved by GSA in delegation of procurement authority. Since GSA review of protested specifications indicates that present specifications would not have been approved as unduly restrictive of competition, recommendation made that solicitation be resubmitted to GSA for approval before proceeding with procurement.

Sanders Associates, Inc. (Sanders), protests that the specifications in request for proposals (RFP) DAAB09-76-R-0016, for lease with option to purchase International Business Machine (IBM) automated data processing equipment (ADPE) or equal, unduly restrict competition. This allegation is premised on the U.S. Army Electronics Command (ECOM) refusal to delete the requirements in Section E, paragraph 3.b(14) and paragraph 3.c(4), of the RFP which require that both the cathode ray tube (CRT) and the printer:

"[M]ust operate on both existing IBM 3271/3272 Controllers and IBM 3271/3272 Compatible Controllers offered in response to this RFP."

Additionally, paragraph 3.d requires that "[E]xisting IBM 3277 CRT's and printers must operate with selected controller." Sanders maintains these specifications impose requirements that are not generally available in the marketplace, except from IBM. As such, they are alleged to be unduly restrictive of competition.

Sanders also seeks disclosure from ECOM of the number of Government-owned devices to which attachments must be made to permit Sanders to formulate a possible exchange/sale. Also, Sanders questions the method by which these devices were procured.

B-186855

The RFP was issued on May 6, 1976. Preparatory to the issuance, ECOM requested on July 31, 1975, a delegation of procurement authority (DPA) from the General Services Administration (GSA) to competitively select, under a lease with option to purchase, 48 terminals (48 CRT's and 48 printers) and 24 Controllers.

On December 9, 1975, the Assistant Commissioner for Automated Data Management Services, Automated Data and Telecommunications Service, GSA, issued the requested DPA to procure the terminals and associated control devices on a brand name or equal basis. It was stressed in the DPA that:

"[F]ailure to operate within the established limitations renders this DPA voidable."

Additionally, item eight of the limitations on the DPA required that the:

"* * * solicitation shall be for Brand Name or Equal to IBM type 3270 system. The salient characteristic being restricted to 'plug to plug' compatibility within IBM 360/65 computer system."

On March 12, 1976, pursuant to Federal Property Management Regulations (FPMR) § 101-32.403(b), the Army sent copies of RFP -0016 to GSA for proposed issuance on March 26, 1976. On March 19, 1976, GSA acknowledged receipt of the copies of the RFP and provided approval to issue. After appropriate pre-solicitation notice, the RFP was issued on May 6, 1976. The initial closing date for receipt of proposals of June 7, 1976, was extended by amendment P001 until July 7, 1976, along with other modifications not here pertinent, and extended again until August 6, 1976, by amendment P0002.

By letter dated May 20, 1976, Sanders submitted a list of questions to the Army concerning both the technical and contractual aspects of the RFP. As germane to this protest, question 17 asked, in part, why the replacing equipment (3277-type) was required to be interfaced into the replaced equipment. By letter dated June 18, 1976, ECOM responded that the requirement was included to insure total interchangeability. Upon receipt of the ECOM's response, Sanders wrote ECOM by letter dated June 23, 1976, as follows:

B-186855

"* * * the requirement set forth in Section F, Paragraph 3.b.(14), Paragraph 3.c.(4) and Paragraph 3.d. be removed from the solicitation. These specifications have to do with 'device interchangeability.' We believe these referenced specifications restrict competition and are not generally available in the marketplace except from IBM."

By letter dated June 30, ECOM responded to Sanders as follows:

"The requirements set forth * * * will remain since several government-owned IBM controllers, IBM 3277 CRT's and 3286 printers will remain and must operate in an 'interchangeable environment.'"

On June 6, 1976, Sanders protested ECOM's refusal to delete the requirement to our Office.

The Army's position is that the specifications reflect its minimum needs. The Army cites decisions of our Office for the proposition that the drafting of specifications is the function of the procuring activity, not our Office or potential offerors. Management Data Systems, Incorporated, B-180586, 180608, January 6, 1975, 75-1 CPD 6. Further, the Army cites the proposition that our Office will not substitute its opinion as to whether a specification exceeds the minimum needs of the Government, except when the agency's position is not supported by substantial evidence. Schreck Industries, Inc., B-183849, October 9, 1975, 75-2 CPD 221. It is also pointed out that the fact that a bidder is unable or unwilling to meet the Government's requirement, as long as the specifications are reasonable and necessary to meet the agency's actual needs, does not necessarily render the specifications unduly restrictive. Holt Brothers-Energy Division, B-184141, September 18, 1975, 75-2 CPD 163. ECOM maintains that the protested specifications are necessary to achieve its required level of actual interchangeability.

Sanders argues that the protested specifications unduly restrict competition because they exceed any legitimate "brand name or equal" or compatible "plug-to-plug" requirement, thereby unduly restricting

B-186855

the competition. Moreover, Sanders believes that the protested specifications contained in the RFP that was issued differ from the specifications approved by GSA in both the DPA and the pre-issuance copy of the RFP sent to GSA on March 12.

The record indicates that the specifications forwarded to GSA with the request for the DPA required only that the equipment offered "[O]perate on an IBM 3271/3272 equivalent controller." The specifications contained in the RFP forwarded to GSA were also the same.

Obviously, the specification in RFP -0016 as issued differ significantly. As a result of the charge raised by Sanders, our Office queried GSA concerning its view of the matter. This was necessary in light of GSA's authority under the Brooks Act, 40 U.S.C. 759 (1970), to coordinate and provide for the economic and efficient purchase, lease and maintenance of ADPE by Federal agencies. GSA has implemented the Brooks Act insofar as it covers the direct procurement of all ADPE, software, maintenance services and supplies in 41 C.F.R. Subpart 101-32.4 (1976). This subpart provides generally that agencies have no authority to procure ADPE except under a proper delegation of procurement authority from GSA. See PRC Computer Center, Inc., et al., 55 Comp. Gen. 60 (1975), 75-2 CPD 35.

By letter dated November 29, 1976, GSA stated, in response to our request:

"The documentation furnished with your letter has been reviewed by certain of our technical personnel responsible for delegation of procurement authority (DPA).

"Our DPA (CPS-6-043) was based on the fact that the technical specifications submitted, required only that the CRT and printer be able to operate on an IBM equivalent controller, not on both existing IBM controllers and equivalent controllers. This latter situation wherein the Army revised the technical specifications after final review is not technically feasible and would not have been approved if it had been submitted to GSA prior to issuance to industry."

B-186855

Therefore, we recommend that the Army resubmit the request for a DPA to GSA for its consideration.

In view of the foregoing, we believe it would be improper for the Army to proceed further under the instant procurement. IRC Computer Center, Inc., supra.

In light of the unduly restrictive aspect of the specifications, we believe that any discussion of the alternate request of Sanders is not necessary.

Since this decision contains a recommendation for corrective action, by separate letters of today, we are so advising the committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

Deputy


Comptroller General
of the United States